

C A M P A I G N F O R ACCOUNTABILITY

October 27, 2017

By email: FOIA@acf.hhs.gov

Kimberly N. Epstein
FOIA Officer
Administration for Children and Families
330 C Street SW, 4th Floor
Washington, DC 20201

Re: Freedom of Information Request

Dear Ms. Epstein:

Campaign for Accountability (“CfA”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., and Department of Health and Human Services (“HHS”) implementing regulations, 45 C.F.R. Part 5.

Specifically, CfA requests that the Administration for Children and Families (“ACF”) produce the following:

1. All records related to Office of Refugee Resettlement (“ORR”) policy regarding services for pregnant unaccompanied immigrant minors in federal custody and/or housed at ORR grantee shelters. This request includes memoranda, directives, policy statements, policy interpretations, policy guidance, talking points, and other similar documents reflecting ORR policy.
2. All records related to ORR Director Scott Lloyd’s visits to ORR grantee shelters that house unaccompanied immigrant minors. This request includes calendar entries, travel and accommodation requests and approvals, itineraries, briefing memoranda, and meeting notes.
3. All communications, meeting notices, meeting agendas, informational materials, talking points, or other documents received by representatives of ORR from, sent by representatives of ORR to, or exchanged between representatives of ORR and representatives of the Susan B. Anthony List, Concerned Women for America, the Heritage Foundation, the Center for Family and Human Rights (“C-Fam”), National Right to Life, Alliance Defending Freedom, Legal Works Apostolate, or the Knights of Columbus regarding services for pregnant unaccompanied immigrant minors in federal custody and/or housed at ORR grantee shelters. This request includes communications to or from anyone using email addresses from the following domains:
 - a. @sba-list.org
 - b. @cwfa.org
 - c. @heritage.org
 - d. @c-fam.org

- e. @nrlc.org
 - f. @adflegal.org
 - g. @legalworks.com
 - h. @kofc.org
4. All communications, meeting notices, meeting agendas, informational materials, talking points, or other documents received by representatives of ORR from, sent by representatives of ORR to, or exchanged between representatives of ORR and representatives of the White House regarding services for pregnant unaccompanied immigrant minors in federal custody and/or housed at ORR grantee shelters.
 5. All communications, meeting notices, meeting agendas, informational materials, talking points, or other documents received by representatives of ORR from, sent by representatives of ORR to, or exchanged between representatives of ORR and members and staff of the U.S. Congress regarding services for pregnant unaccompanied immigrant minors in federal custody and/or housed at ORR grantee shelters.

Please provide all responsive records from March 1, 2017, to the date the search is conducted.

By way of background, in March of this year, Scott Lloyd was appointed by President Donald J. Trump to be the Director of the Office of Refugee Resettlement (“ORR”).¹ Shortly after his appointment, Mr. Lloyd began aggressively pursuing a new policy to make it difficult, if not impossible, for pregnant unaccompanied immigrant minors to obtain abortions.² The policy is the subject of ongoing class action litigation filed on behalf of J.D., a 17-year-old pregnant unaccompanied immigrant minor in Texas, and other similarly situated pregnant unaccompanied immigrant minors.³ The litigation most recently resulted in a federal court order restraining Mr. Lloyd and others acting in concert with him from “interfering with or obstructing J.D.’s access to abortion counseling or an abortion,” “forcing J.D. to reveal her abortion decision to anyone, or revealing it to anyone themselves,” or retaliating against J.D. or the grantee shelter where she resides.⁴

In addition to the records requested above, please provide records reflecting the processing of this request, including any tracking sheets; records sufficient to identify search terms used, and locations and custodians searched. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

CfA seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material

¹ Betsy Woodruff, *Trump’s Pick for Refugee Czar Never Resettled Refugees*, *Daily Beast*, Apr. 10, 2017, available at <https://www.thedailybeast.com/trumps-pick-for-refugee-czar-never-resettled-refugees>.

² Renuka Rayasam, *Trump official halts abortions among undocumented, pregnant teens*, *Politico*, Oct. 16, 2017, available at <http://www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-243844>.

³ Complaint for Injunctive Relief and Damages, *Garza v. Hargan*, No. 17-02122 (D.D.C. Oct. 14, 2017).

⁴ Amended Temporary Restraining Order, *Garza v. Hargan*, No. 17-02122 (D.D.C. Oct. 24, 2017).

of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, text messages, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁵ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; CfA has a right to access those files even if they have not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁶

In addition, please note that in conducting a “reasonable search” as required by law, ACF must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered ACF’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁷ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but ACF’s archiving tools would capture that email under Capstone. Accordingly, CfA insists that ACF use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. CfA is available to work with ACF to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an

⁵ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149-150 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—956 (D.C. Cir. 2016).

⁶ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, ___, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁷ Presidential Memorandum – Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), available at <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), available at <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

exemption” or “disclosure is prohibited by law.”⁸ If it is your position that any portion of the requested records is exempt from disclosure, CfA requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁹ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹⁰ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹¹

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹² Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, CfA welcomes an opportunity to discuss its request with ACF before you undertake your search or incur search or duplication costs. By working together at the outset, CfA and ACF can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format via email at koconnor@campaignforaccountability.org. Alternatively, our mailing address is Campaign for Accountability, 611 Pennsylvania Avenue SE, #337, Washington DC 20003. If it will accelerate the release, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, CfA requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute significantly to a better understanding of relevant government procedures by the general public. Moreover, the

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹² *Mead Data Central*, 566 F.2d at 261.

request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹³

CfA requests a waiver of fees because disclosure of the requested information is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁴ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

According to press reports and court documents, Director Scott Lloyd and ORR staff have expended significant time and resources on implementation of the new ORR policy regarding services for pregnant unaccompanied immigrant minors in federal custody. For instance, Mr. Lloyd has become personally involved in the decision of multiple minors in his agency’s care to obtain abortions,¹⁵ and has directed ORR and grantee shelter staff to do the same.¹⁶ A federal court has found that such actions, at least in the case of J.D., likely violate the law.¹⁷ The public deserves to know how the policy in question was shaped and implemented, and the documents sought by this request will help shed light on those issues.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) organization, CfA does not have a commercial purpose and the release of the information requested is not in CfA’s financial interest. CfA is committed to protecting the public’s right to be aware of the activities of government officials and to ensuring the integrity of those officials. CfA uses a combination of research, litigation, and advocacy to advance its mission. CfA will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CfA will disseminate any documents it acquires from this request to the public through its website, www.campaignforaccountability.org.

Accordingly, CfA qualifies for a fee waiver.

News Media Fee Waiver Request

CfA also asks that it not be charged search or review fees for this request because CfA qualifies as a “representative of the news media” pursuant to the FOIA and HHS regulation 45 C.F.R. § 5.53. In *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit found the National Security Archive was a representative of the news media under the FOIA, relying on the FOIA’s legislative history, which indicates the phrase “representative of the news media” is to be interpreted broadly; “[i]t is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to

¹³ See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁴ 45 C.F.R. § 5.54(a).

¹⁵ Plaintiff’s Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, Ex. D at 3, Ex. E at 2, Ex. G at 3, *Garza v. Hargan*, No. 17-02122 (D.D.C. Oct. 14, 2017).

¹⁶ *Id.* at 8, Ex. G at 3, Ex. H at 3, Ex. I at 2.

¹⁷ Amended Temporary Restraining Order, *Garza v. Hargan*, No. 17-02122 (D.D.C. Oct. 24, 2017).

work as expected . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*” 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis added), cited in *id.* CfA meets this test.

CfA routinely and systematically “gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.”¹⁸ It does so by regularly posting documents it receives through open records laws, including the FOIA, to its website,¹⁹ analyzing those documents, and publishing reports, letters, and further requests based those documents.²⁰ Based on its publication activities, CfA qualifies as a “representative of the news media” under the FOIA and agency regulations.

Request for Expedited Processing

Pursuant to 5 U.S.C. § 552 (a)(6)(E)(i) and 45 C.F.R. § 5.27, CfA requests that ACF expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief that there is an urgent need to inform the public about the federal government activity that is the subject of this request. ORR’s policy regarding services for pregnant unaccompanied immigrant minors in federal custody and/or housed at ORR grantee shelters has changed significantly since March of this year.²¹ The implementation of this new policy has dire consequences for the pregnant unaccompanied immigrant minors in ORR’s custody, and immediate implications for the many individuals and organizations that seek to assist them.²² Despite significant media interest in recent weeks, the American public still knows very little about what ORR’s new policy entails, and how it came to be adopted. The information sought in this request will meaningfully further public understanding on this issue of pressing national concern.

Additionally, CfA is primarily engaged in disseminating information to the public. CfA’s mission is to investigate the actions of powerful interests at every level of society and to work on behalf of the public interest to expose corruption, negligence, and unethical behavior wherever it may occur. CfA will use the information gathered, and its analysis of it, to educate the public

¹⁸ 45 C.F.R. § 5.3; 5 U.S.C. § 552(a)(4)(A)(ii)(III).

¹⁹ Letter from Daniel Stevens, Executive Director, Campaign for Accountability, to Thomas B. Pahl, Acting Director, Bureau of Consumer Protection, Federal Trade Commission (July 19, 2017), *available at* <https://campaignforaccountability.org/work/ftc-solar-complaint/>; Letter from Katie O’Connor, Legal Counsel, Campaign for Accountability, to Margaret Moore, Travis County District Attorney (Sept. 26, 2017), *available at* <https://www.documentcloud.org/public/search/projectid:35338-CfA-Letter-to-Travis-County-DA-9-26-17>.

²⁰ Campaign for Accountability, *Utah Commission for the Stewardship of Public Lands*, Sept. 7, 2017, *available at* <https://campaignforaccountability.org/work/utah-commission-stewardship-public-lands/>; Campaign for Accountability, *Documenting Discrimination*, July 2016, *available at* <https://campaignforaccountability.org/work/documenting-discrimination/>; CfA Complaints Against the Heidi Group, Sept. 26, 2017, *available at* <https://campaignforaccountability.org/work/cfa-complaints-against-the-heidi-group/>.

²¹ Rayasam, *Politico*, Oct. 16, 2017.

²² *Id.*

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through reports, press releases, and other media. CfA will also make the materials it gathers available to the public on its website.

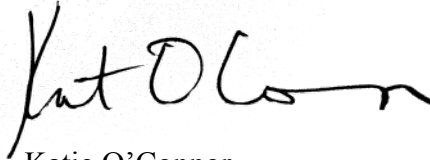
Accordingly, CfA's request satisfies the criteria for expedition.

Conclusion

CfA looks forward to working with ACF on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact me at 202-780-5750. Further, if CfA's request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Katie O'Connor". The signature is fluid and cursive, with the first name "Katie" written in a larger, more prominent script than the last name "O'Connor".

Katie O'Connor
Legal Counsel